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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM.

PATRICK H. O'BRIEN,
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leave to appeal to the United States Supreme Court from the judgment entered by the Supreme Court of the State of Michigan, on June 4, 1934, sustaining the opinion of the Corporation Tax Appeal Board of Michigan in favor of the validity of the statute. (Act No. 85, Public Acts of 1921, as amended by Act No. 175, Public Acts of 1929.) The order allowing the appeal was signed and entered by the Chief Justice of the Supreme Court of the State of Michigan on July 2, 1934.

Statement of the Case.

The Detroit International Bridge Company, appellant, in its statement of points intended to be relied upon, filed with this Court, sets forth three assignments of error.

I. (a) That Act No. 85, Public Acts of 1921, as amended by Act No. 175, Public Acts of 1929, of the State of Michigan, is constitutional in application to appellant and its business.

(b) That said Act so far as applied to appellant does not violate Article I, Section 8, Clause 3, of the Constitution of the United States.

(c) In applying said statute and imposing the privilege fee for the year 1933, upon appellant, the State of Michigan did not unduly interfere with and thereby usurp the power of Congress of the United States to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States.

II. The tax imposed by Section 4 of said Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, not being imposed on the privilege to be a corporation (such tax being imposed by Section 3 of said Act No. 85 of the Public

Acts of 1921, as amended by Section 3 of Act No. 175 of the Public Acts of 1929), but being imposed on the privilege to do the business for which organized and such business of the plaintiff being solely and exclusively the maintenance and operation of an instrumentality of foreign commerce, viz., an international highway toll bridge, such privilege (as distinguished from the privilege to be organized as a corporation with power to do such business if permitted by the competent authority) is not grantable by or otherwise within the competency of the State of Michigan, but is solely within the jurisdiction of Congress under Article I, Section 8, Clause 3, of the Constitution of the United States and the Supreme Court of the State of Michigan erred in not holding said Section 4 of said Act not applicable to plaintiff and its business or not valid under said provision of the United States Constitution if so applied.

III. Under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, it is provided that in computing the annual privilege fee imposed upon corporations that property used exclusively in foreign commerce be excluded from the computation of the tax; that even if the imposition of said tax upon petitioner and plaintiff in error is proper (which we deny), the Supreme Court of the State of Michigan erred in not excluding from the computation of said tax the property of the petitioner and plaintiff in error, which is used exclusively in foreign commerce.

No Federal Question Involved.

It is the contention of the Corporation Tax Appeal Board of Michigan, appellee, that the United States Supreme Court is without jurisdiction to review on appeal the judgment entered by the Supreme Court of the State of Michigan on July 2, 1934, under the provisions of the Judi-

cial Code, Section 237 (U. S. C. A. Title 28, Section 344) for the reason no Federal question is involved. In support of this contention appellee cites the following cases:

Henderson Bridge Company v. *Kentucky*, 166 U. S. 150;

Kansas City F. S. & M. Ry. Co. v. *Botkin*, 240 U. S. 227, 60 L. Ed. 617;

Arkansas and Memphis Railway Bridge and Terminal Company v. *State*, 295 Southwestern 378 (Arkansas) 275 U. S. 548, (certiorari having been denied by the Supreme Court, 275 U. S. 548);

Nebraska Ex Rel Beatrice Creamery Co. v. *March*, 282 U. S. 799.

Article 4 of the Michigan Tax Law Is Not Unconstitutional in Its Application to Appellant.

The question involved in this issue represents the validity of a Michigan statute, Act 85, Public Acts of 1921, as amended by Act 175, Public Acts of 1929, which appellant contends is unconstitutional in its application to the Bridge Company. Pertinent provisions of the statute:

> "Sec. 4. Privilege fee, Basis of. Every corporation organized or doing business under the laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every

> corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

The Detroit International Bridge Company, a Michigan corporation, organized in 1927, paid its initial franchise fee to bring into being a corporation. This initial fee is paid but once and is distinguished from the privilege fee, which represents an annual tax imposed upon

> "Every corporation organized or doing business under the laws of this state * * *"

and exacted for

> "The privilege of exercising its franchises and of transacting its business within the state." (Sec. 4, *supra.*)

Upon the completion of the Bridge in 1929. appellant claimed exemption from the payment of the privilege tax because its powers were limited to the operation of the Bridge which constituted foreign commerce and that the imposition of the tax by the State of Michigan would violate Article I, Section 8, Clause 3, of the Constitution of the United States. This question was raised by appellant involving the constitutionality of the statute, for the year 1930. see *In Re:*

Detroit International Bridge Company, 257 Michigan 52.

Said appeal was taken from a decision by the Tax Appeal Board sustaining and upholding the decision of the Secretary of State in denying the exemption of appellant. The Michigan State Supreme Court sustained the Corporation Tax Appeal Board in its holding. Thus holding valid in its application to appellant, Act 85, Public Acts of

1921 as amended. The identical questions raised in this issue were before the State Supreme Court in the original case of 1930, and the State Supreme Court after discussing the questions involved, in its decision said in part:

> "We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of the corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between Detroit and Canada. It is a fee imposed by law 'for the privilege of exercising its franchise and of transacting its business within this State.' 'The distinction between such a fee and a tax upon property was clearly pointed out in *Union Steam Pump Sales Co.* v. *State*, 216 Mich. 261, and later *In Re Truscon Steel Co.*, 246 Mich. 174, and *In Re G. H. Hammond Co.*, 246 Mich. 179. The question presented is so clearly disposed of *In Re Detroit & Windsor Ferry Co.*, 232 Mich. 574, that further discussion seems unnecessary.' "

An appeal was taken from the Supreme Court of Michigan in the case, *supra*, to the Supreme Court of the United States

> *Detroit International Bridge Company* v. *Corporation Tax Appeal Board*, 287 U. S. 295,

and because appellant failed to establish it had no power to carry on any business that was not within the protection of the commerce clause, the constitutional question involved was not decided by this Court. Appellant had argued the additional purposes were merely incidental to the main purposes.

The Bridge Company amended its articles in May of 1933, and the purposes of the corporation are as follows:

> "To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit,

Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

In submitting to the State its annual report for 1933, the Bridge Company enclosed a check for $2.00 filing fee but claimed exemption as to the privilege fee, stating it had power only to engage in foreign commerce and claiming imposition by the State of the privilege tax would violate the Constitution of the United States. The Secretary of State disallowed the claim of appellant and the matter was appealed to the Corporation Tax Appeal Board which in turn upheld the Secretary of State. An appeal was taken to the State Supreme Court entitled:

Detroit International Bridge Company v. *Corporation Tax Appeal Board,* 267 Mich.—case not yet printed in Advance Sheets.

The identical questions were again presented to the Supreme Court as in the original case and again our State Supreme Court declared the law constitutional in its application to appellant. The court said in part:

"Plaintiff now claims that, under its charter, it can do no intrastate business, its only corporate power is to operate the bridge, such operation is foreign commerce and, therefore, the privilege fee is a burden upon such commerce and contravenes the Federal Constitution.

"We need not inquire whether plaintiff has any intrastate power under statutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases deal-

ing with taxation and regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and *In re Detroit & Windsor Ferry Company*, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local powers was not given weight. These cases are determinative upon plaintiff's liability for the fee.

"However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, 'interstate commerce' includes foreign commerce. *In re Detroit & Windsor Ferry Company, supra.*

"There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff.

"Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business." • • •

And the court proceeds to distinguish cases cited by appellant and concludes by stating:

"In our opinion, the fact that plaintiff carries no persons or goods across the international line is determinative that it is not engaged in foreign commerce and its property is not so used by it."

Appellant, the Detroit International Bridge Company, as a Michigan corporation, is liable for the privilege tax, 1st: because it is *organized* under Michigan Law, (see Section 4, *supra*), 2nd: because it has the *privilege* and *right* to exercise its corporate franchise and for this *right* the State is seeking to exact a privilege tax. The Bridge Company is still holding authority to do business in Michi-

gan and has held such authority during the entire period covered by the privilege tax. It is apparent, therefore, that the State of Michigan is not attempting to tax the Bridge Company for business which it has transacted or is about to transact in Michigan. On the other hand, it is attempting to tax appellant for the *existence* of a *right* and not the *exercise* of the right. Regarding the case in this light it is manifest that this suit presents no Federal question.

Since the tax in this case is on the *right* to do business and the amount of the tax may lawfully be computed on the value of the property although used in foreign commerce, it is obvious that the method employed by the State of Michigan cannot be questioned by this Court as being a burden upon foreign commerce or in violation of Article I, Section 8 of the Constitution of the United States. In support we cite the following cases:

Flint v. *Stone Tracy Co.*, 220 U. S. 107.
Ashley v. *Ryan*, 153 U. S. 436.
Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217.

We respectfully submit that the judgment of the Supreme Court of the State of Michigan upholding the constitutionality of the statute was decided clearly in accord with the decisions, *supra*, of this Court applicable to the Federal question involved, and should be affirmed. The appeal should be denied.

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